M. Caryl

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JEFFERSON COUNTY
CIRCUIT COURT

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

BARRY D. SCHMEHL, an individual as an officer of Filly's of America, Inc.

Petitioner,

v.

CIVIL ACTION NO. 05-C-337
Honorable Thomas W. Steptoe, Jr.

VIRGIL T. HELTON, acting State Tax Commissioner of West Virginia

Respondent.

ORDER DENYING PETITION FOR APPEAL

The Court considered this matter on June 29, 2006, upon a Petition for Appeal from the April 15, 2005 decision of the West Virginia Office of Tax Appeals in favor of Tax Commission. Petitioner Schmehl is represented by Michael E. Caryl, Esq. and the firm of Bowles, Rice, McDavid, Graff & Love, LLP. Katherine A. Schultz, Senior Deputy Attorney General of West Virginia represents Respondent Tax Commissioner. The Court reviewed the Petition, all exhibits, and other supporting material submitted therewith. The Court reviewed the findings of fact under the clearly erroneous standard and the application of law under an abuse of discretion standard. W. Va. Code §48-27-510(d) (2006). The Appeal is **DENIED** for the reasons set forth below.

Factual and Procedural Background

Filly's of America, Inc. (Filly's) operated a restaurant and bar. At its incorporation it officially designated Petitioner as its corporate secretary. Although he began his employment with Filly's as a bartender, after a year and half Petitioner only performed bookkeeping services as an employee and independent contractor for the corporation on and off for four and half years. These services included retrieving sales tax information off of a computerized recording system of all the sales, preparing the consumer sales and service tax returns, and signing and sending checks to the state about once a month. Even so, Petitioner claims that the President, Paul Horn, had to approve the payment to the state. Beginning in the summer of 2000, Petitioner was aware that the corporation was collecting the sales tax and not remitting it to the state.

On December 8, 2000, the West Virginia State Tax Commissioner (Commissioner) assessed a tax liability against Filly's and it became final on February 6, 2001. On November 4, 2004, the Commissioner issued an assessment against Petitioner for unpaid consumer sales and service tax because he was the corporate secretary. He was still corporate secretary at the time of the assessment against him. Petitioner timely appealed this assessment and the West Virginia Office of Tax Appeals held a hearing. At this hearing, Petitioner in one instance stated that he held stock in Filly's and then in another stated that he did not. The Administrative Law Judge (ALJ) noted this discrepancy and found that, (1) as an officer, Petitioner was personally liable for Filly's default on the consumer sales and service tax, (2) Petitioner's defense of having to defer to a higher authority is without merit, and (3) the assessment is not barred by the three-year statute of limitations. Petitioner timely appealed that decision to this Court.

Standard of Review

A Circuit Court reviews the findings and conclusions of the Tax Commissioner under a clearly erroneous and abuse of discretion standard unless the incorrect legal standard was applied. Syl. pt. 5, *Frymier-Halloran*, 193 W. Va. 687, 458 S.E.2d 780 (1995). The above standards of review are deferential and presume that the agency's actions are valid as long as the administrative decision is supported by substantial evidence or by a rational basis. *Id.* at 695. The Circuit Court's review of issues of law is de novo, but the Court is not allowed to substitute its own judgment for that of an administrative agency. *Loyal Order of Moose, Martinsburg*

Lodge No. 120 v. State Tax Commissioner, No. 03-C-152, 2006 WL 1390803, at *4 (W. Va. May 18, 2006) (per curium); *CB&T Operations Company, Inc. v. Tax Commissioner of the State of West Virginia*, 211 W. Va. 198, 202 564 S.E.2d 408, 412 (2002).

Law and Reasoning

The Tax Appeal Office decided three issues in this case: (1) whether Petitioner is personally responsible for any unpaid consumer sales and service tax liability of Filly's due to the fact that he was its corporate secretary, (2) whether Petitioner's personal liability is excused because others had final authority concerning the filing and payment of taxes due, and (3) whether the general three-year statute of limitations for issuing assessments, set forth in W. Va. Code § 11-10-15(a), bars the Respondent from issuing an assessment against the Petitioner for periods prior to November 2001.

I. Statute of Limitations

Petitioner argues that the assessment for the period ending in September 2000 is barred by the three-year statute of limitations because it did not become final until February 2001 and the Commissioner did not issue an assessment against him until November 2004. Further, he claims that *In re Bowen* supports the use of the three-year statute of limitations because that Court held that delinquent corporate sales tax and related liabilities are enforced against officers and corporations in the same manner; thus making the liability against him an assessment and not a collection. 116 B.R. 477 (S. D. W. VA. 1990).

Respondent argues that the five-year statute of limitations applies and none of the Commissioner's assessments are barred because his liability is a collection according to the West Virginia Code of State Rules. In addition, *In re Bowen* does not support Petitioner's argument because the relevant State Rule had not been promulgated when that case was decided.

The following statutes are relevant:

> The amount of any tax additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable shall be assessed within three years after the date the return was filed (whether or nor such return was filed on or after the date prescribed for filing).

W. Va. Code § 11-10-15(a) (2003).

> Every proceeding instituted by the tax commissioner for the collection of the amount found to be due under an assessment which has become final of any tax, additions to tax, penalties or interest imposed by this article or any of the other articles of this chapter to which this article is applicable, irrespective of whether such proceeding shall be instituted in a court or by utilization of other methods provided by law for the collection of such tax, additions to tax, or penalty or interest, shall be brought or commenced within ten years after the date on which such assessment has become final.

W. Va. Code § 11-10-16(a) (2003) (amended in 1993 to read ten years instead of five years).

> An assessment against officers is considered to be a proceeding for the collection of the tax liability of the corporation or association. If the liability of the corporation or association is determined to be due by an assessment which has become final, an assessment against an officer must be made within five years after the assessment against the corporation or association has become final.

W. Va. Code St. R. § 110-15-4a.7.1 (2006) (effective date July 15, 1993).

The Court in *In re Bowen* held that a plain reading of W. Va. Code § 11-15-17[1] demonstrates that delinquent corporate sales tax and related liabilities are enforced against officers "as against the association or corporation which they represent." 116 B.R. at 480. Therefore, the Court found that the three-year rather than the five-year statute of limitations applied because the Tax Department's notice of a jeopardy assessment does not constitute a collection action as contemplated by § 11-10-16(a).

The Court finds that the Tax Appeals Office used the correct legal standard when it

[1] This is the relevant statute that provides liability to corporate officers for delinquent consumer and sales taxes.

applied the five-year[2] statute of limitations in W. Va. Code St. R. § 110-15-4a.7.1 to Petitioner's liability. Although the plain reading of W. Va. Code § 11-15-17 provides for the same enforcement against corporations and their officers, the Court cannot disregard a legislative rule that provides that assessments against officers are considered to be proceedings for collection. W. Va. Code St. R. § 110-15-4a.7.1 provides that if the liability of a corporation is determined to be due by an assessment that has become final, as in this case, an assessment against an officer must be made within five years after the assessment has become final. Therefore, the Commissioner's assessment against Petitioner is a collection proceeding. Thus, the Court upholds the Tax Appeals Office's conclusion that the assessment issued against Petitioner "was timely issued with respect to all periods included in this assessment." Schmehl, Barry D., No. 05-023 C (W. Va. Office of Tax App. 2005).

II. Officer Liability

Under a liberal construction of the tax statutes, Petitioner argues that he is not liable for Filly's tax debt because he did not have ultimate authority over the disbursement of funds and he did not perform the bookkeeping services on a consistent basis because of illness. Further, Petitioner is not liable because he was only secretary in name, he did not act as a corporate officer.

Respondent contents that Petitioner did act as a corporate officer because he probably holds stock in Filly's and he possessed the authority to file consumer sales and service tax and sign checks for Filly's. Petitioner has not shown that the Tax Office's opinion was clearly erroneous or an abuse of discretion.

[2] The Tax Appeals Office states that the limitations periods is apparently ten years because of the 1993 amendments to W. Va. Code § 11-10-16(a). However, as of June 29, 2006, W. Va. Code St. R. § 110-15-4a.7.1 states a five-year limitations period. The Court does not uphold or reverse this finding of law from the Tax Appeals Office because under either a five or ten year limitations period, Respondent is not barred from assessing Petitioner.

West Virginia holds corporate officers personally liable for any sales tax and penalty owed and not paid by the corporations. W. Va. Code § 11-15-17 (2005). The statute reads,

> If the taxpayer is an association or corporation, the officers thereof shall be personally liable, jointly and severally, for any default on the part of the association or corporation, and payment of the tax and any additions to tax, penalties and interest thereon imposed by article ten of this chapter may be enforced against them as against the association or corporation which they represent.

Id.

Liability imposed by such a statute is valid so long as the statute is afforded a fair and reasonable interpretation so as to give effect to the legislative intent as indicated by the language used. *State ex rel. Haden v. Calco Awning and Window Corp.*, 153 W. Va. 524, 527 170 S.E.2d 362, 364 (1969). The taxpayer has the burden to prove by clear and cogent evidence facts establishing that the statute was applied in an unreasonable or arbitrary manner. *Id.* at Syl. pt. 2. However, laws imposing a tax are strictly construed and if there is doubt as to their meaning they are construed in favor of the taxpayer and against the state. Syl. pt. 3, *Coordinating Council for Independent Living, Inc. v. State Tax Commissioner*, 209 W. Va. 274, 546 S.E.2d 454 (2001).

The test to determine if an individual may be held liable for unpaid corporate tax is whether the person has acted as a corporate officer. *Frymier-Halloran*, 193 W. Va. 687, 692 458 S.E.2d 780, 785 (1995). Although the Court in that case was referring to individuals who were claiming that they were not officers, this test has been annunciated in the legislative regulations. W. Va. Code St. R. § 110-15-4a.5 states that officers of a corporation or association that are personally liable for consumer sales tax include any secretary who performs duties or responsibilities in the management of the corporation. A recent Tax Appeals Office decision clarified this rule by holding that

> a person who is in fact an officer of a corporation is personally liable for the unpaid consumers' sales and service tax liability of the corporation by virtue of his or her status as an officer with any actual managerial authority, regardless of whether the officer had the authority to make or to supervise directly the day-today financial decisions on behalf of the corporation, and regardless of whether the officer knew of the corporation's default with respect to its consumers' sales and service tax obligations.

Sanitized Decision, No. 06-026 C & 06-027 W (W. Va. Office of Tax App. 2006).

In that case, the ALJ found that he was not a corporate officer who was personally liable because his estranged brother listed him on the corporate application as an unspecified officer at an address at which he never resided and did not inform him of this listing.

In this case, Petitioner is not merely secretary in name like the Petitioner that was unknowingly listed by his estranged brother. Petitioner was the corporate secretary from Filly's inception and he prepared and filed tax returns along with the required remittance. He had authority to sign checks. Starting in 2000, Petitioner knew that he was filing no-remittance consumers sales and service tax. Moreover, in one instance he admits to owning stock in Filly's and in the other denies owning stock.

The Court cannot find that the Tax Appeals Office unreasonably applied any of the tax statutes to Petitioner's case. And even though tax laws are strictly construed, the Court cannot find doubt to the statute's meaning because it clearly imposes joint and several liability on corporate officers and the regulations clarify the statute stating an officer must have managerial authority as well as designation as officer. Here, he had managerial authority because he had authority to prepare and file tax returns, and to sign the checks remitting the amounts owed.

The Court emphasizes that Petitioner contradicted himself at the Tax Appeal Office's hearing by stating he did own stock in Filly's and then a few minutes later denying he owned stock. Therefore, the Court finds his self-serving testimony that he was only a contract worker and was not in fact an officer suspect. For the same reason the Court finds the Tax Appeal Office's view that Petitioner cannot escape liability by claiming that superiors had the final authority is rational.

Conclusion

The Court finds the Tax Appeal Office's decision is supported by substantial evidence and by a rational basis. Petitioner has not overcome his burden to prove that the decision was erroneous or an abuse of discretion. The Tax Appeal Office applied the correct standards of law.

ACCORDINGLY, the Petition for Appeal is **ORDERED DENIED.**

The Court notes all parties' exceptions and objections to all adverse rulings.

The Clerk shall **ENTER** this **ORDER,** and shall forward an attested copy to counsel and pro se parties of record.

ENTERED this 5th day of July, 2006.

2cc
M. Caryl
K. Schultz
7/6/06
DP

Honorable Thomas W. Steptoe, Jr.
Judge, 23rd Circuit

The Clerk is directed to retire this action from the active docket and place it among causes ended.

A TRUE COPY
ATTEST:
PATRICIA A. NOLAND
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.
BY D. Pittinger
DEPUTY CLERK